BALACHANDRAN K ARUJUNAN & ANOR v. PP

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
AHMAD NASFY YASIN JCA
GUNALAN MUNIANDY JCA
[CRIMINAL APPLICATION NO: P-07-87-10-2021]
8 MARCH 2022

Abstract – *A notice of motion seeking to invoke the original jurisdiction of the Court of Appeal pursuant to s. 44(1) of the Courts of Judicature Act 1964 read with r. 76 of the Rules of the Court of Appeal 1994 ought to fail in the absence of a pending matter before the court; s. 44 only becomes operative when there is a pending proceeding before the Court of Appeal and the court is moved for consequential orders or directions. The court cannot, on the facts, entertain the motion as to do so would amount to the court committing a jurisdictional error.*

COURTS: *Jurisdiction – Court of Appeal – Notice of motion for bail pursuant to r. 68 of Rules of Court of Appeal 1994 – Challenge against constitutionality of s. 41B of Dangerous Drugs Act 1952 – Competency of Court of Appeal to hear and determine constitutional questions – Whether there was pending proceeding before court – Whether applicants were moving court for consequential orders – Whether application fell within meaning envisaged by s. 44 of Courts of Judicature Act 1964 – Whether s. 44 confined to civil claims*

The applicants, who were charged before the Magistrate's Court for an offence under s. 39B of the Dangerous Drugs Act 1952 ('DDA'), were denied bail and hence, filed an application by way of notice of motion with a certificate of urgency at the High Court. However, the application before the High Court, on the basis that s. 41B of the DDA is unconstitutional, was dismissed. Thereafter, the applicants filed a notice of motion dated 7 May 2021 before the Federal Court to be released on bail, contending that s. 41B of the DDA was unconstitutional for being contrary to arts. 5, 8 and 121 of the Federal Constitution. However, the application was subsequently struck out. In the present application by way of a notice of motion, the applicants sought their release on bail pursuant to s. 388(1) of the Criminal Procedure Code ('CPC') and/or under the inherent powers of the Court of Appeal ('COA') and challenged the constitutionality of s. 41 of the DDA. In support of the application, the applicants averred that: (i) this application was made pursuant to the provisions of r. 68 of the Rules of the Court of Appeal 1994 ('RCA') which confers on the COA powers to hear and decide this notice of motion; and (ii) r. 76 of the RCA read with s. 44 of the Courts of Judicature Act 1964 ('CJA') vests in the COA the jurisdiction to hear and determine the

A constitutional questions raised by the applicants. The respondent raised an objection to the application on the grounds that: (i) the application was incompetent to be heard by the COA; and (ii) the application was an abuse of the process.

B **Held (dismissing application *in limine*)**
Per Gunalan Muniandy JCA delivering the judgment of the court:

(1) Section 44 of the CJA only becomes operative when there is already a pending proceeding before the COA and a party to the proceeding moves the court to make consequential orders or give direction for the purposes set out therein. The instant notice of motion was a standalone application before the COA that sought to invoke its purported original criminal jurisdiction. There was no pending appeal in respect of the criminal proceedings against the applicants ongoing in the High Court. A fresh proceeding in the COA in the nature of a notice of motion does not fall within the meaning of proceeding, as envisaged in s. 44, to vest the COA with jurisdiction and powers to make the orders concerned. Further, s. 44(1) of the CJA, on the face of it, is plainly confined to civil claims on appeal before the COA for directions pending the hearing of the appeal. It does not extend to the appellate criminal jurisdiction which the notice of motion sought to invoke. (paras 10, 17 & 20)

(2) The COA would have had a role had the applicants appealed against the decision. As there was no appeal against the decision, it left the COA with no jurisdiction to deal with the question of the constitutionality of s. 41 of the DDA, or the decision by the HC to refuse the bail application under s. 388(1) of the CPC as the same were not before this court for judicial determination *via* the appeal process. This court would be committing a jurisdictional error if it proceeded to hear the applicants' notice of motion when there was no pending proceeding within the meaning of the explicit and abundantly by clear wording of s. 44(1) of the CJA. Hence, the preliminary objection was allowed and the notice of motion was dismissed *in limine*. (paras 19-21)

Legislation referred to:
Courts of Judicature Act 1964, ss. 44(1), (2), 84
Criminal Procedure Code, s. 388(1)
Dangerous Drugs Act 1952, ss. 39B, 41, 41B
Federal Constitution, arts. 5, 8, 121
Rules of the Court of Appeal 1994, rr. 68, 76

For the appellants - Gopal Sri Ram, N Sivananthan, Yasmeen Soh Sha-Nisse & Nabila Habib; M/s Sivananthan
For the respondent - Mohd Dusuki Mokhtar, Nahra Dollah, Aslinda Ahad & Muhammad Azmi Mashud; DPPs

Reported by S Barathi

JUDGMENT

Gunalan Muniandy JCA:

Background

[1] On 8 December 2010, both the applicants were charged before the Magistrate's Court at Georgetown, Penang for an offence under s. 39B of the Dangerous Drugs Act 1952 ("DDA").

[2] An application for bail was made before the Magistrate and that application was denied. Since then, both the applicants have been remanded at the Remand Prison, Penang and Pokok Sena Prison, Kedah, respectively.

[3] Dissatisfied with the decision of the Magistrate, both the applicants filed an application by way of a notice of motion with a certificate of urgency. The certificate was premised on the matter of liberty of both the applicants. On 30 April 2021, the learned Judicial Commissioner ("LJC") dismissed the application.

Our Decision

[4] The applicants/first and second accused in the High Court ("A1 & A2") filed a notice of motion ("NOM") before us primarily seeking an order that A1 and A2 be granted bail pursuant to s. 388(1) of the Criminal Procedure Code and/or under the inherent powers of the Court of Appeal on terms deemed fit based on the grounds raised in the applications' affidavit in support ("AIS").

[5] By way of background, we would adopt the summary given by the applicants in their written submission as follows:

(i) The applications are a married couple who were arrested on 2 December 2020 at their home in Tanjung Bungah, Penang, and were later charged under s. 39B DDA.

(ii) At the time of filing of this written submission, their case has just been transferred to the High Court from the Magistrate's Court.

(iii) Previously, the applicants had filed an application to the Penang High Court for bail on the basis that s. 41B DDA is unconstitutional. On 30 April 2021, Mohd Radzi, JC of Penang High Court (6) who heard the application rejected it and has produced his written grounds of judgment for so doing.

(iv) The essence of the grounds in support of this application can be summarised as follows:

(a) Section 41B, DDA is unconstitutional because:

(1) It cuts across the basic structure doctrine;

(2) It contravenes art. 121 FC;

(3) It is *ultra vires* art. 5 FC; and

(4) It is *ultra vires* art. 8 FC.

(b) The first applicant should be allowed bail because:

(1) He is of old age (64 years old); and

(2) He suffers from diabetes mellitus, hypertension and dyslipidaemia.

(c) The second applicant should be allowed bail because:

(1) She is of old age (65 years old);

(2) She is a woman; and

(3) She suffers from high blood pressure.

[6] We have given our due attention to the sequence of events proceeding the appellants' application to move the COA to grant bail for the capital charge before the High Court.

[7] Firstly, the Magistrate's Court concerned dismissed their bail application. Likewise, the NOM at the High Court for the same purpose also failed. Secondly, the applicants thereafter filed an application by way of NOM dated 7 May 2021 before the Federal Court for them to be released on bail, contending that s. 41B of DDA was unconstitutional for being contrary to arts. 5, 8 and 121 of the Federal Constitution (FC). At the Federal Court, the respondent had raised a preliminary objection by way of notice of objection dated 29 September 2021 on the ground that the application is incompetent to be heard by the Federal Court and the application is an abuse of process. On 7 October 2021, the Federal Court had struck out the applicants' application after the applicants withdrew their application.

[8] Ultimately by way of NOM that has come before us dated 12 October 2021, they are seeking an order that the applicants be released on bail and are also challenging the constitutionality of s. 41 of the DDA as they did in the Federal Court and failed. This application is made pursuant to r. 68 of the Rules of the Court of Appeal 1994 ("RCOA").

[9] Before we proceeded the respondent brought to our attention that by way of notice of objection dated 29 November 2021 they had raised an objection to the applicants' application on two following grounds:

(i) the application is incompetent to be heard by the Court of Appeal; and

(ii) the application is an abuse of process.

This notice had duly been served on the applicants.

[10] Before we proceed to deliberate on the respondent's preliminary objection ("PO") as above, it is first and foremost important to emphasise that the instant NOM is a standalone application before the Court of Appeal ("COA") that seeks to invoke our purported original criminal jurisdiction ("OCrimJ") as there is no appeal before us in respect of the criminal proceedings against A1 and A2 ongoing in the High Court. This NOM for bail pertains to the criminal charges preferred against them in the High Court.

[11] The basis of the applicants' submission in support of the above NOM can be gleaned from the following averments in their AIS:

(i) that this application is made pursuant to the provisions of the r. 68 Rules of the Court of Appeal 1994 ("RCOA") which confers on the COA powers to hear and decide this NOM; and

(ii) rule 76, read with s. 84 of the Courts of Judicature Act 1964 ("CJA"), vests in the COA the jurisdiction to hear and determine the constitutional questions that have been raised in the applicants' AIS.

[12] For the record, by way of an oral application before us, applicants' counsel sought to amend s. 84 of the CJA to s. 44. The oral application was, by consent, allowed.

[13] For convenience, we reproduce rr. 68 and 76 of the RCOA and s. 44 CJA as follows:

> 68. Applications.
>
> (1) All applications to the Court shall unless otherwise provided be made by motion and shall be heard in open court.
>
> (2) A NOM shall be substantially in Form 9 in the First Schedule.
>
> (3) A NOM shall be served on the parties concerned not less than four days before the return day, unless the Court otherwise orders. Applications for leave to give shorter notice may be made by motion *ex parte*.

Rule 76 of the Rules states as follows:

> 76. Ancillary powers of the Court.
>
> The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

[14] Section 44 of the CJA provides as follows:

> 44 (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the

A hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

B (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

[15] As noted above, the applicants have moved this court to decide on constitutional questions posed to us on terms raised in their AIS with a view C to granting the orders sought by recourse to the provisions of s. 44 of the CJA read with r. 76 of the RCOA.

[16] In considering the applicants' contention that we are vested with the powers and jurisdiction to determine the said constitutional question in the exercise of our purported original criminal jurisdiction, it is crucial for us to D pay careful attention to the wording of s. 44, CJA which, in our view, is explicitly clear and unambiguous leaving no room for vagueness. As such, we have adopted a literal interpretation of the terms of s. 44.

[17] It is clear as daylight that s. 44 of the CJA only becomes operative when there is already a pending proceeding before the COA and a party to E the proceeding moves the court to make consequential orders or give direction for the purposes set out therein. To our minds, a fresh proceeding in the COA in the nature of a NOM as in this instance does not fall within the meaning of proceeding as envisaged in s. 44 to vest the COA with jurisdiction and powers to make the orders concerned.

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[18] In this instance, it was common ground that the applicants' NOM for bail pursuant to s. 388(1) CPC at the Penang High Court which was dismissed did not proceed further than the Penang High Court and did not come before the COA. There was no reference made to any higher court for directions or G decision on constitutional questions arising from the bail application pursuant to s. 84 of the CJA.

[19] As rightly brought to our attention by, the respondent, the COA would have had a role had the appellants appealed against the decision that s. 41 of the DDA was constitutional and hence, that the application for bail on the H ground advanced was baseless. As no appeal was brought to us against this decision, it left the COA with no jurisdiction to deal with the question of the constitutionality of s. 41, DDA as raised in the present NOM or the decision by the HC to refuse the bail application under s. 388(1) of the CPC as the same are not before us for judicial determination *via* the appeal process.

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[20] We, therefore, uphold the respondent's contention that we would be committing a jurisdictional error if we proceed to hear the appellant's NOM for the orders sought primarily to challenge the constitutionality of s. 41 of the DDA when there is no pending proceeding before us within the meaning of the explicit and abundantly by clear wording of s. 44(1) of the CJA. The very opening line of this section alludes to a proceeding pending before the COA which is not the case here where the proceeding is pending only at the High Court whereas this NOM is a fresh application before us unconnected with any appeal or other proceeding before us. In our considered view, the deeming provision in s. 44(2) does not make any difference as it is manifestly clear that the express purpose of s. 44(1), CJA is to confer on us jurisdiction and powers to issue incidental directions and interim orders specifically to prevent prejudice to the claim of parties pending the hearing of any proceeding already before us. In our view, it obviously does not encompass a trial pending at the court below. We would venture to add that s. 44(1) CJA on the face of it is plainly confined to civil claims on appeal before us for directions pending the hearing of the appeal. It does not extend to our appellate criminal jurisdiction which the NOM seeks to invoke.

Conclusion

[21] For the reasons aforesaid, the PO as formulated by the LDPP on a question of law was allowed by us. We are in entire agreement with the respondent's contention that it would be erroneous for the appellants to invoke s. 44 of the CJA to be read together with r. 76 of the RCOA which purportedly confer jurisdiction on us to grant the orders prayed for. We, therefore, dismissed the instant NOM *in limine* without deliberating on the merits of the constitutional question posed therein.